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No.

Supreme Court, U.S.
FILED
NOV 25 1987
JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BARBARA BROOKS,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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QUESTION PRESENTED

Is the voluntariness of a confession to the striking of her child and giving him salted water "consistent with the Constitution" where extracted from a thirty-four year old black woman in her eighth month of pregnancy, who had never been in a police station before, who had had no sleep or food for the three days preceding her admission, where she was held in a small, sparsely furnished room for hours, seated on a hard chair, without food or water or access to a telephone, separated from her husband and her remaining seven children, initially interrogated by two detectives without giving of Miranda warnings, and later, after being threatened with the removal and loss of her children by one of two Youth Officers, where she made her initial, oral statement to a black assistant state's attorney to whom she complained of the threat, where the State of Illinois never produced either the assistant state's attorney or the Youth Officer at petitioner's motion

to suppress though under a burden of Illinois law to produce every "material witness" to a confession where the defendant so demands.

PARTIES TO THE PROCEEDING SOUGHT TO BE REVIEWED

Petitioner, Mrs. Barbara Brooks, a private citizen.

Respondents: The State's Attorney of Cook County, Illinois; the Attorney General of Illinois.

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OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 115 Ill.2d 510, 505 N.E.2d 336 (1987). A copy of this opinion is attached as an appendix to this Petition. This opinion reversed the holding of the Appellate Court of Illinois which had reversed and remanded Petitioner's conviction for a new trial in a reported opinion, 138 Ill.App.3d 332, 485 N.E.2d 1342.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3). The judgment of the Supreme Court of Illinois was entered on February 20, 1987. Timely petition for rehearing was denied on March 30, 1987 and this Petition has been filed within 60 days of the denial of rehearing.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitu-

tion of the United States:

> "No person . . . shall be compelled on a criminal case to be a witness against himself . . . ."

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States:

> "[N]or shall any State deprive any person of life, liberty or property without due process of law . . . ."

STATEMENT OF THE CASE

On the afternoon of June 21, 1982 (R. 88)[1] , five year old Solomon Brooks, Jr. died at Wyler Hospital. His parents, Barbara Brooks, the Petitioner herein, and Solomon Brooks, Sr., were charged with his murder in a two-count indictment. The cause of the child's death was vigorously contested by experts for both prosecution and defense. At the close of the State's case-in-chief, the trial court entered judgment in favor of Mr. Brooks. (R. 358) Petitioner was found guilty of involuntary manslaughter (R. 548), a "lesser included offense," and has been free on appeal bond set by the Supreme Court of Illinois on August 23, 1983. (R. 622)

1. The Motion To Suppress

A hearing was held on Petitioner's written motion to suppress statements on

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1 "R ___" refers to the consecutively paginated transcript of proceedings and includes both the report of proceedings and the common law record.

June 6, 1983. (R. 11) The motion alleged inter alia:

> 7. That due to the physical, physiological, mental, emotional, educational, and/or psychological state, capacity and condition of your Petitioner, she was incapable and unable to appreciate and understand the full meaning of her Miranda rights and that any relinquishment of such rights was therefore not the free and rational choice of the Petitioner and was not made voluntarily, knowingly and intelligently.
>
> 8. That the statements sought to be suppressed were obtained as a result of psychological and mental coercion, illegally directed against Petitioner, her husband and her children and such statements were, therefore, involuntarily given. (R. 595-596)

Petitioner testified that she was interrogated four times by the police before making an oral statement to Assistant State's Attorney ("ASA") Edwards in the presence of Detective Dwyer of the Chicago Police Department, and Youth Officers Holz and Abrans. (R. 106-108) She was entering her eighth month of pregnancy and had seven children. She had just lost her five year old. She had not eaten or slept from the 19th to the 22nd

of June, 1982. On June 20, her son was taken to Roseland Hospital and then to Wyler's Hospital. (R. 86-87) The trial court refused to permit Petitioner to testify to her emotional and psychological condition while her son was in the hospital. (R. 87)

Dwyer testified that on June 22, 1982 he went to the home of Petitioner and her husband and asked them to come to Area 2 Violent Crimes. (R. 43) He knew that Petitioner was seven months pregnant. (R. 44)

At 11:30 a.m. Dwyer saw the Brooks' and their seven children at Area 2. (R. 14) He immediately separated the parents from each other and from the children. (R. 46)

Petitioner was put in a sparsely furnished 9 by 12 foot room. (R. 47) Dwyer left her alone for 15 to 20 minutes. (R. 50)

At his initial interrogation, Dwyer and his partner, McNally, did not advise Petitioner of her Miranda rights. On concluding their questioning, she was

again left alone. (R. 16)

Youth Officers Holz and Abrans had arrived at the station because of the children. (R. 44) About 4:30 p.m., Assistant State's Attorney ("ASA") Edwards arrived and Dwyer had a conversation with him. (R. 29-30)

According to Dwyer, a second interrogation of Petitioner began about 5 or 5:30 p.m. He testified that he read Mrs. Brooks her Miranda rights and she "indicated" she understood. (R. 32-33) Present as well were the two Youth Officers and McNally.

Dwyer testified that Edwards did not participate in this interview but came into the room to ask Dwyer to conclude. The interrogation lasted twenty minutes. (R. 33)

Sometime later, Assistant State's Attorney Frost arrived at Area 2. Dwyer talked with him after 7:30 p.m. (R. 35) A third interview was then conducted with Mrs. Brooks by ASA Frost accompanied by ASA Edwards and Dwyer. (R. 35) Frost told Mrs. Brooks his office, that he was

not her lawyer, and read her her rights. (R. 36) She made a statement. When she finished, the three men left the room and Frost summoned a court reporter. (R. 37) Later they returned and tooked a recorded statement. (R. 38)

Barbara was visually separated from her family. (R. 49)

Dwyer testified he did not hear a Youth Officer tell Petitioner he was going to take her children away because she was lying and she would never see them again. (R. 58) There were five people in the room but only Dwyer asked questions. One youth officer had turned a chair around and was leaning forward at Petitioner. (R. 60) Barbara was not told that she was a suspect, but she was no longer free to leave the station. (R. 63)

Dwyer had a short conversation alone with Barbara before ASA Edwards arrived. He never offered her a cushion to put her feet up. He never compared himself to "Starsky and Hutch." (R. 64) He offered her food. (R. 66)

Dwyer stated ASA Edwards might have

spoken to Barbara Brooks after 6:30 p.m. but he could not recall if Edwards had gone in the room alone and introduced himself to her. (R. 67) He did not recall Mrs. Brooks shaking or digging her fingers into her hands or jumping up from her seat. (R. 70) He told Barbara at the second interview that her kids said she struck Solomon, Jr. with the bat. (R. 75)

Petitioner testified that on June 22, 1982 she was entering her eighth month of pregnancy and had seven children, and had just lost her four-year old. She had been married to Mr. Brooks for almost seven years. (R. 81)

At 3:00 p.m. on the 22nd, her husband called and told her their son had died. She said she was in shock and disbelief. The court sustained the prosecution's objection to what she did that evening. (R. 88)

At 5:30 a.m. on June 22, people from Children and Family Services came to the house to examine her other children. (R. 89) The court sustained an objection as

to what these people said to Mrs. Brooks. (R. 89) At 8:00 a.m., the DCFS investigators returned. At 10:00 a.m. a man from the funeral parlor came to her home. She was in shock, "devastated." (R. 90) Mrs. Brooks said she'd had nothing to eat, no sleep, only water. Shortly after the funeral parlor agent left, the police arrived and spoke to her husband. (R. 91) Fifteen minutes later they went to the station, arriving between noon and 12:30 p.m. She went to the second floor to a large area with desks and chairs. (R. 92) After 30 to 40 minutes, Dwyer and McNally told her to go in a room and closed the door. (R. 94) She was not told she was free to go, why she was at the station, or that she could see her husband and have her children with her. (R. 94) She was psychologically falling apart. She was alone in the room for 45 minutes. Then McNally and Dwyer came in, closing the door after them. McNally stood by the door and Dwyer walked towards her. She was sitting behind the desk, her back to the barred window. (R. 95) Dwyer knock-

ed a phone directory off the table and across the room and told her she'd murdered her son. She said she didn't know what he was talking about. He did not advise her of her rights. He told McNally she was lying and he and McNally left the room. (R. 96, 97) They came back twenty minutes later.

At this second interview, Dwyer stood across from Mrs. Brooks and told her that her husband told him he saw her beat their son. She replied he didn't because it was not true. Dwyer told her he had papers for child abuse. She said he did not. (R. 98) She asked to see them but was never shown. (R. 99) Again, she was not advised of her rights nor offered food or drink or a phone call. (R. 100) Dwyer refused to let her see her husband. He said the children could not come in the room. She had begun shaking all over and scratching her hands till they were bleeding. (R. 101) Dwyer and McNally left again. They returned a half hour later.

At the third interview, Dwyer and

McNally brought two youth officers along. McNally and the "stout" youth officer stood by the door; Dwyer sat at one end of the table and the other officer was standing behind him. She was not given her rights. (R. 102) The stout youth officer told her:

> "They had to take my kids away. ***He said that if I didn't admit that I killed my child, that they would take them away and I'd never see them again. That they would go to jail and they'd never see us again."

She jumped up and said not to take her kids away, she didn't murder her son. The youth officer, leaving the room, said: "She's lying," and that they were getting ready to take the children now. (R. 104, A. 4) The men left, closing the door. Ten minutes later Dwyer returned alone.

When Dwyer returned, he offered Barbara food. It was about 6:20 p.m. and he was smiling. He said sometimes you have to try to scare someone by acting like "Starsky and Hutch." He told her - "Just say that you may have hit him" - it was dark and they figured she was lying.

If she says that, she can take the kids and go home. (R. 105, A. 4)

Dwyer left the room and a black assistant state's attorney, Mr. Edwards, came in alone and introduced himself. (R. 172, A. 4)

Barbara told him:

> "They told me if I didn't say that I may have hit my child with a bat, they were going to take them away."

Edwards said "What?" and, as Dwyer came in, she said, "Never mind." The youth officers were with Dwyer. (R. 106-07) Barbara made a statement to Edwards and he left, returning with ASA Frost. (R. 108) Frost then took an oral statement.

Frost admitted that he never asked Barbara if she had been well-treated by the police or if threats or promises had been made to her in return for her statement. (R. 156)

Barbara Brooks had never been in a police station before. (R. 111) Though the door to the room she was in was not locked the one time she tried it, (R. 116), she did not think she was allowed to leave the room to see her children. She did not ask. (R. 117) Her son Shon had

snuck in before the second time the detectives came in. (R. 114)

Barbara admitted that she was mistaken about when she was first given her rights. She remembered Dwyer gave them before she saw Edwards, possibly when Dwyer told her to say she may have hit her son. (R. 121) She remembered telling Edwards that he needn't give her her rights because Dwyer had. She did not remember making a statement about "the incident" at this time to Edwards. When Frost came in, Edwards, Dwyer, McNally and the youth officers were with him. (R. 124) She made a statement. (R. 125)

Around the time of the oral statement she was given food. It was late and she did not eat it. (R. 127) She did not really read the court reported statement but looked at it and signed a waiver of rights. (R. 129) She did not know the name of the youth officer she called "stout." (R. 133) He had dark brown hair. The other youth officer was thinner; she didn't know his name and couldn't describe him, saying "he really didn't say

anything." (R. 134) She could not recall if any officer told her what her children had told them. (R. 135) She did not know if ASA Edwards heard what she said about the police when they were alone. (R. 137)

Assistant State's Attorney Frost confirmed that he arrived at Area 2 on June 22 around 7 to 7:15 p.m. At that time he spoke with ASA Edwards and Detectives McNally and Dwyer. Afterwards, he spoke to Mrs. Brooks who was in custody. (R. 145, 146) At this time, he explained who he was and what he did. ASA Edwards and Dwyer were present. No youth officers entered the room. (R. 147, 148) He stated no one in his presence exercised any psychological or mental coercion on defendant. (R. 148) He then replaced the chair she had been sitting on. (R. 149) He explained:

> "[T]he chair that she was seated in was a plastic chair, a hard chair, and she indicated if she could have a better chair, so I went out and got one that had more of a spongy bottom to it." (R. 150)

He called for a reporter and subsequently, at 9:10 p.m. took a reported statement which Mrs. Brooks made changes on and initialed.

Frost stated that ASA Edwards told him he was present during Barbara Brooks' first statement. He did not recall seeing any food in the interview room. (R. 153)

During the reported statement he said that he did not ask Mrs. Brooks if she had received any threats or promises which caused her to give the statement but did ask her during the oral. (R. 155) Charles Holz, a Chicago Police youth officer, testified his partner, to the best of his knowledge, was in South Chicago Hospital on medical leave. Only Dwyer talked to Petitioner. He never told her that if she didn't admit to killing her son, he'd have her children taken from her. He and his partner were "in and out" during the interview. Defendant's physical condition seemed good and he did not see her gouging her hands. (R. 171)

During cross examination he stated that he was not present when ASA Edwards had a conversation with defendant. (R. 172)

The court sustained an objection as to whether Holz had been told while he was at Area 2 on the 22nd that Edwards had had a conversation with Mrs. Brooks. (R. 173)

Holz saw ASA Edwards go into the interview room where Barbara Brooks was. He was possibly accompanied by another investigator. (R. 174) Edwards could have been in with her for more than five minutes. (R. 175)

Holz did speak to Barbara Brooks while she was in the interview room. (R. 175) He did not know if the door was open. First he asked her questions about her children, "because we had to make out a card." He had a subsequent conversation with her in the presence of Detective Dwyer. (R. 176-77) He first spoke with her at 3:30 p.m. and the second time was between 3:30 and 4:30. (R. 178) Either

McNally or Dwyer was present during his first conversation with her. (R. 179)

On argument, the defense raised the absence of two material witnesses: ASA Edwards and Youth Officer Abrans. Defense counsel also stated to the court that his client's mental condition was relevant, citing Reck v. Pate, 367 U.S. 433.

2. The Trial

Pursuant to a conference, defendant waived a jury and trial commenced to the court. (R. 196-198)

Dwyer testified Petitioner told him that her child had fallen down the stairs but she kind of pushed him with her foot. She had lost her temper, grabbed the baby bottle, and began punching and striking Solomon, Jr. She then told her son, George, to bring a baseball bat and he did. She then repeatedly hit her son with it. (R. 210)

Dwyer said that she told him, his partner, and the youth officers that she then went up to the kitchen and made a

salt water solution and forced Solomon, Jr. to drink it by squeezing the bottle into his mouth. She then took the child to her husband who was asleep upstairs. She woke him up, told him what the child had done and left him. The child came out crying, carrying or wrapped in a short sheet. She said she shoved him with her foot down half a flight of stairs. (R. 211) She said that later the child developed severe diarrhea and that while standing in the corner he repeatedly excreted in his clothes. She cleaned him up and put him to bed. (R. 212) Dwyer testified he left then to interview defendant's husband.

Dr. Kirschner testified for the State: his opinion as to cause of death was:

> "Multiple blunt trauma injuries to the head, intentionally inflicted, with salt or salt water ingestion." (R. 317)

He agreed that it was not medically possible to determine whether Solomon

Brooks, Jr. died simply from blunt trauma or simply from hypernatremia. (R. 318)

He stated that one of the major concerns of hypernatremia is the swelling of the brain. (R. 334) In his protocol he called this "cerebral edema" which herniated the brain causing loss of heart rate and respiration (R. 335) and death (R. 339). He admitted the bleeding he found in the skull could be due to hypernatremia (R. 336), and that there was nothing on the brain showing it had been damaged by trauma. (R. 337) There was no "mass effect" from this bleeding which is necessary in order for someone to die of bleeding in the brain. (R. 338) He "did not find evidence of [sickle cell trait] in the chart," but noted some cells appeared "sickled" under the microscope. (R. 340) He stated this condition had no effect on the body's ability to deal with salt. (R. 341) All children respond to salt elevation differently (R. 342) and that the amount of salt to cause hypernatremia could be calculated and that three

teaspoons might be sufficient. (R. 344) He said that the hemorrhage in the brain was not "the crucial thing here," that it is "one sign." (R. 347)

Barbara denied that she struck her son in the head with the bat and did not kick him down the stairs, (R. 429) Her answers in her written statement were not true. (R. 430-32)

At the conclusion of her direct, the court sequestered her from her counsel. (R. 437)

The defense also called the attending physician, Dr. Lucille Lester. (R. 373) She was qualified as an expert (R. 377), and gave her opinion that the cause of death was hypernatremic dehydration. (R. 384)

She said some bruises on the child could have been caused by something other than "normal childhood activity," but that was not the cause of death. (R. 391, 395) One to two tablespoons of salt in a small amount of water could have caused this degree of dehydration. (R. 396)

Dr. Peter Hydemann was qualified as an expert for the defense. He agreed that the cause of death was hypernatremia - elevated salt. (R. 504) He did not believe that trauma to the head had anything to do with the child's death. (R. 511) But the presence of "sickel cell trait" aggravated the elevated salt condition. (R. 502) And it made the child more susceptible to bruising. (R. 502) CAT scan and lumbar puncture tests were consistent with hypernatremic dehydration. (R. 496-499)

The court found Barbara Brooks guilty of the lesser included offense of involuntary manslaughter and later sentenced her to five years imprisonment. (R. 548, 561)

REASONS FOR ALLOWING THE WRIT

The voluntariness of a confession is uniquely a federal question. Miller v. Fenton, 474 U.S. --, 88 I.Ed.2d 405, 410-411, 106 S.Ct. 445 (1985). The focus of the voluntariness inquiry is whether there is any action by the State that coerced the defendant to confess. Colorado v. Connelly, 93 I.Ed.2d 473, 107 S.Ct. 515, 520 (1986). It is well-settled under Illinois law that the State, in order to discharge its "heavy burden" of proving that a confession is voluntary, must produce all "material witnesses" connected with an allegedly involuntary statement or explain their absence. People v. Armstrong (1972), 51 Ill.2d 471, 476, 282 N.E.2d 712:

> "'[T]he persons who must be called as witnesses or whose absence must be explained are those persons whose testimony would be material on the issue of the voluntary nature of the confession.' People v. Sims (1961), 21 Ill.2d 425, 432. See also People v. Thomas (1974), 22 Ill.App.3d 854, 318 N.E.2d 342; People v. Willis (1975), 26 Ill.App.3d 518, 325 N.E.2d 715."

But the production of two obviously material witnesses was never done here. Two key individuals, according to Mrs. Brooks' testimony at the motion to suppress were never produced - Abrans, a Youth Officer who allegedly threatened to take her children or who may have witnessed his partner make such a threat; and the only other black representative of the State, Assistant State's Attorney Edwards, who took Petitioner's initial oral statement.

The Illinois appellate court found both of these individuals to be "material" and ordered a new trial where the State would have to produce them or not use Petitioner's statements, the oral one and a subsequent written one. Indeed, that court dismissed the State's arguments that even if these witnesses were produced, the outcome of the hearing would not have changed:

> "This argument assumes either that Edwards and Abrans would deny defendant's allegations, or that the trial judge would disregard testimony corroborating her allegations. Both assumptions are repugnant to the material witness rule, which

> requires the State to produce witnesses before the trial court weighs the evidence. Assume rather that Abran testified that Holz [the other Youth Officer] did threaten defendant, and assume further that Edwards testified that defendant appeared very distraught and told him that she had been threatened. Can the State truly argue that the outcome of the hearing would have been the same?"

Barbara Brooks testified at the motion to suppress that she was interrogated on at least four different occasions on June 22nd. The total period of isolation was extensive - at least eight hours. She testified as to the enormous pressure she was under having just lost her son. She had not slept for three days preceding the interrogations. She had never been in a police station before. She was not given food until after her oral statement. She was forced to sit, seven or eight months pregnant, in a hard plastic chair during the entire time, until she made an oral statement at which time ASA Frost gave her a cushion. She was told her children would be taken from her forever. The

record contains no finding that the remaining seven children bore evidence of child abuse. Each of these factors bears upon the totality of the circumstances making up a voluntariness determination. See Miller v. Fenton, 474 U.S. --, 88 I.Ed.2d 405, 106 S.Ct. 445 (1985).

Throughout the day and the evening of her isolation and interrogation, Petitioner stated she grew increasingly upset. She could not withstand the threat to take her children:

> "If I didn't admit that I killed my child, that they would take them [her children] away and I'd never seen them again. That they would go to jail and they'd never see us again." (R. 103)

This Court has recognized that:

> "There is torture of the mind as well as body; the will is as much affected by fear as by force." Watts v. Indiana, 338 U.S. 49, 52 (1949).

The police persisted in their efforts to wear down Mrs. Brooks' resistance and make her change her mind. The slamming of a telephone book was a threat of physical violence. See Brown v. Mississippi, 297

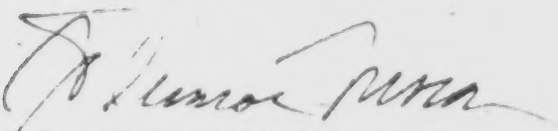
U.S. 278 (1936). But far more critical was the threat to take away her children, a major factor in this Court's declaring a confession constitutionally infirm in Lynumn v. Illinois, 372 U.S. 528 (1963).

The testimony of Youth Officer Abrans and Assistant State's Attorney Edwards was crucial to the trial court's initial voluntariness determination and the defense had a right to rely on the Illinois material witness rule that they would be produced for cross-examination at the hearing on the motion to suppress. Under the circumstances here, the State's non-production vitiated Petitioner's constitutional rights against self-incrimination and due process of law.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant the instant Petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of Illinois.

Respectfully submitted,



John Thomas Moran, Esq.
Attorney for Petitioner.

APPENDIX

Docket No. 62869—Agenda 6—September 1986.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellant,
v. BARBARA BROOKS, Appellee.

JUSTICE MILLER delivered the opinion of the court:

Following a bench trial in the circuit court of Cook County, the defendant, Barbara Brooks, was found guilty of involuntary manslaughter and sentenced to a term of five years' imprisonment. The appellate court reversed the conviction and granted the defendant a new trial (138 Ill. App. 3d 332), and we allowed the State's petition for leave to appeal (103 Ill. 2d R. 315(a)).

The defendant and her husband were indicted and tried jointly for the murder of their four-year-old son, Solomon. At the close of the State's evidence the trial judge entered a finding of not guilty in favor of Mr. Brooks. The case then proceeded against Mrs. Brooks alone, and the trial judge found her guilty of involuntary manslaughter, an included offense of murder. The State's evidence against the defendant consisted of the statements she made to the police, including a written confession, and of expert medical testimony regarding the cause of the child's death. The defendant admitted to police that on the evening of June 19, 1982, while at home in Chicago with her family, she struck the child and gave him a baby's bottle containing a mixture of salt, pepper, and water to punish him for taking a bottle from a younger child. After striking the victim with a small souvenir baseball bat, the defendant left him with her husband for further discipline; Mr. Brooks had been asleep on the second floor of the family's house. Following that, the defendant told the child to return to the basement, and she shoved him with her foot, causing

him to fall down about eight steps. The child developed diarrhea later that night. The next morning the child was taken to Roseland Hospital, and later he was transferred to Wyler Children's Hospital, where he died on June 21. According to Dr. Robert Kirschner, deputy medical examiner for Cook County, the child died as a result of blunt trauma injuries to the head with salt-water ingestion. The defendant testified at trial, and she explained that she gave the child the salt water as punishment; she denied hitting the child as she had said in her statement to the police. Two physicians who testified in the defendant's behalf attributed the child's death solely to his ingestion of salt.

The appellate court considered only one of the issues raised on appeal by the defendant. With one justice dissenting, the court determined that the State failed to present the testimony of two material witnesses at the hearing on the defendant's motion to suppress her statements. The two missing witnesses were an assistant State's Attorney named Edwards and a youth officer named Abran. Abran was in the hospital at the time of the suppression hearing, and the court believed that his testimony could be excused. The appellate court found error, however, in the State's failure to have Edwards testify, and therefore the court reversed the defendant's conviction and remanded the cause for a new trial. It may be noted that in similar cases the appellate court, in remanding the cause for a new suppression hearing under the rule in *People v. King* (1975), 61 Ill. 2d 326, has instructed the trial court to conduct a new trial only if the suppression motion is allowed. See *People v. Tucker-El* (1984), 123 Ill. App. 3d 955, 959; *People v. Parquette* (1984), 123 Ill. App. 3d 233, 238; *In re J.C.* (1979), 69 Ill. App. 3d 289, 293.

All but two of the six law-enforcement officers who took part in or witnessed the interrogation testified at

the suppression hearing, and they denied that the defendant was threatened or mistreated in any way. The defendant was questioned on some four separate occasions on June 22, 1982. She arrived at Area Two headquarters around noon that day with her husband and children. According to the State's evidence, Detectives Robert Dwyer and Raymond McNally interviewed the defendant around 12:30 or 1 o'clock that afternoon. After speaking with the pathologist, the defendant's husband, and several of the children, Dwyer conducted a second interview with the defendant around five o'clock that afternoon. At this time Dwyer advised the defendant of her *Miranda* rights. McNally and two youth officers, Abran and Holz, were present during this period of questioning. Following that interview, Dwyer offered the defendant food. The defendant was questioned a third time, around 7:30 that evening, by Assistant State's Attorney William Frost; Dwyer and another assistant State's Attorney, Edwards, were also present. Frost then summoned a court reporter, and around 9 o'clock that night the defendant gave a statement in the presence of Frost, Dwyer, and the court reporter.

The defendant testified to essentially the same chronology of events, though she believed that Dwyer and McNally talked to her on an additional occasion early in the afternoon. Also, the defendant thought that McNally and the youth officers were present at the second to the last interview, which occurred around 7:30. At the suppression hearing the defendant contended that her inculpatory statements were involuntary and resulted from threats made by the officers to take her other children from her; she did not allege any physical misconduct on the part of the officers. The defendant also testified that distress over the one child's illness and eventual death prevented her from eating or sleeping for the three days preceding the questioning. The defendant testified that,

late in the afternoon on the day of her interrogation, Dwyer and McNally entered the interview room with two youth officers, whose names she did not know. According to the defendant, the shorter, stouter youth officer threatened to take her children from her if she did not admit the killing. The defendant said that she jumped up and begged that her children not be taken away. According to the defendant, the stout youth officer said that they were getting ready to take the children, and everyone left the room. The defendant testified that about 10 minutes later Dwyer returned, alone; he was smiling, and he explained that the other officers had been trying to frighten her. According to the defendant, Dwyer said that if she admitted hitting the victim, she could take the children and go home. Dwyer then left the room. The defendant also testified that Assistant State's Attorney Edwards came in the room about 6:30 or 6:40. He was alone, and after identifying himself he asked the defendant whether she had received her *Miranda* warnings, which he then gave to her. The defendant testified that she told Edwards about the threat to take her children from her but that she was not sure whether he heard her. According to the defendant, Dwyer and the youth officers then entered the room, and they questioned her again.

The material-witness rule originated as *dictum* in *People v. Rogers* (1922), 303 Ill. 578, 590. In *People v. Armstrong* (1972), 51 Ill. 2d 471, 475-76, it was explained that, under the rule, "[t]his court has consistently held that when the voluntary nature of a confession is brought into question by a motion to suppress, the State must produce all material witnesses connected with the taking of the statements or explain their absence." Thus, the rule requires the State to present the testimony of those who were present during the misconduct alleged. (*People v. Wright* (1962), 24 Ill. 2d 88, 93.)

As we have said, two witnesses did not testify at the suppression hearing in this case: a youth officer, Abran, and an assistant State's Attorney, Edwards. The defendant argues that Abran was a material witness because he was present during the late afternoon interview when a youth officer threatened her with the loss of the children. Holz testified at the suppression hearing, however, that Abran had been involved in a traffic accident and was in a Chicago hospital at that time. The appellate court found that to be an adequate explanation for Abran's absence, and we agree. See *People v. Wright* (1962), 24 Ill. 2d 88.

To support her argument that Edwards was a material witness, the defendant refers to the evidence that Edwards was in her presence at other times that day. Thus, the defendant cites Officer Dwyer's testimony that Edwards looked in the door briefly during the second interrogation, to explain that his shift would end soon and therefore another assistant should be requested, and Frost's testimony that Edwards may have said that he had spoken to the defendant and taken a statement from her. To this it may be added that Edwards was present during the second to the last interview, which preceded the production of the defendant's signed confession. As further support for her argument that Edwards was a material witness, the defendant refers to her testimony describing her brief conversation with him around 6:30 p.m. on the day of her interrogation. At the suppression hearing the defendant testified as follows:

> "[THE DEFENDANT]: Edwards came in by himself and he introduced himself. He said something like he was for the People, something like that.
>
> [DEFENSE COUNSEL]: He was the attorney for the People?
>
> A. Yes, and I told him, I said, 'They told me if I didn't say that I may have hit my child with a bat, they

were going to take them away,' and he just said, 'What?', and that's when Dwyer and the youth officers came in, and I just said, 'Never mind,' because I didn't want to get into any deeper trouble. I don't know whether he heard it or not, but he—"

The defendant did not testify that Edwards took part in any of the misconduct she alleges or that he was present when any of the threats were uttered, and the State's witnesses denied that the defendant was ever threatened. We need not speculate that Edwards' response was an exclamation of astonishment, for the defendant's testimony indicates that it was not—she testified that she did not know whether Edwards heard her make the complaint, and his response, according to her testimony, would indicate that he did not.

The material-witness rule was meant to serve a practical purpose, and it does not require mechanical application. (*People v. Jennings* (1957), 11 Ill. 2d 610, 618.) Thus, we fail to see how the evidence mentioned above, without more, would establish Edwards as a material witness, and therefore the State was not required to present his testimony at the suppression hearing. See *People v. Hills* (1980), 78 Ill. 2d 500, 506; *People v. Smith* (1974), 56 Ill. 2d 328, 332-33; *People v. Joe* (1964), 31 Ill. 2d 220, 226; *People v. Curtin* (1962), 24 Ill. 2d 191, 194; *People v. Sims* (1961), 21 Ill. 2d 425, 431-32.

A number of other issues were raised but not decided in the appellate court, and we shall consider them here. The defendant argues that she was deprived of the assistance of counsel by a sequestration order made by the trial judge during a recess in her testimony. At the conclusion of the defendant's direct examination a lunch recess was taken, and the trial judge explained that he was going to prohibit all communication with the defendant during that period:

"THE COURT: It is 12:00 o'clock now. I'm going to

sequester your witness. I want no one to talk to her, neither State nor you. You completed your direct. I will break with that. We'll sequester her in the conference room. Then after lunch the State will conduct their cross-examination.

Do all of you understand what you're doing?

[A DEFENSE ATTORNEY]: Judge, I'll explain to her present [*sic*] in court.

They're going to put you in this room, Barbara. Someone is to bring you food. No attorneys, nor your husband are to talk to you or be with you during this break.

THE WITNESS: Okay.

THE COURT: Okay. We'll recess this till 1:00 o'clock."

The trial resumed as scheduled, and the State began its cross-examination of the defendant at that time.

This court considered a similar restriction in *People v. Noble* (1969), 42 Ill. 2d 425. In that case the trial judge prohibited any discussion between the defendant and counsel during an overnight recess that came during the defendant's cross-examination; counsel objected to the order, but the trial judge overruled the objection and denied a motion for a mistrial. This court found that the sequestration order deprived the defendant of his sixth amendment right to the assistance of counsel and granted the defendant a new trial, rejecting the State's argument that the defendant should be required to show that he was prejudiced by the restriction. (42 Ill. 2d 425, 431.) In *Geders v. United States* (1976), 425 U.S. 80, 47 L. Ed. 2d 592, 96 S. Ct. 1330, the United States Supreme Court found a violation of the right to the assistance of counsel in a trial judge's order, made over objection, prohibiting the defendant from consulting with counsel during an overnight recess between the defendant's direct examination and cross-examination. The recess in that case lasted 17 hours, and the *Geders* court

expressly did not decide whether orders barring communication for briefer periods would also violate the right to the assistance of counsel. (425 U.S. 80, 89 n.2, 47 L. Ed. 2d 592, 600 n.2, 96 S. Ct. 1330, 1336 n.2.) A number of courts have extended the holding in *Geders* to shorter breaks, however, including lunchtime recesses (see *United States v. Conway* (5th Cir. 1980), 632 F.2d 641; *United States v. Bryant* (6th Cir. 1976), 545 F.2d 1035; *United States v. Allen* (4th Cir. 1976), 542 F.2d 630), and the defendant contends that the trial judge's sequestration order in this case was similarly unconstitutional.

The defendant's argument must fail, however, for she has not shown an essential predicate for relief: that the trial judge's sequestration order deprived her of the assistance of counsel, for however long or short a period of time. No objection was made to the order, and neither the defendant nor defense counsel referred to it when the proceedings resumed after the lunch break. There is nothing in the record to signify that the defendant and her attorneys wished to communicate during that period. In *Bailey v. Redman* (3d Cir. 1981), 657 F.2d 21, the defendant was told not to discuss his testimony with counsel during an overnight recess called in his cross-examination. No objection was made to the order, however, and therefore the court distinguished *Geders*, which had involved a recess of similar length. The court in *Bailey* explained:

> "[The defendant] did not question or object to the court's instruction nor has he presented evidence to corroborate his assertion that he failed to do so because of the 'chilling' effect of the court's admonition. [Citation.] Accordingly, we find no evidence that appellant was *deprived* of a right that he sought to exercise.
>
> Our holding in the instant case is based not on appellant's failure to prove the exact 'prejudice' caused by his

> inability to meet with counsel; rather, it is based on his failure to demonstrate that he was actually 'deprived' of his right to consult with his attorney. We concur with the district court that
>
> > '[while it] is one thing to say that a defendant who has been deprived of the guiding hand of counsel need not demonstrate the prejudicial effect of that deprivation; it is quite another to say that he need not show that the challenged order deprived him of counsel he would otherwise have received.' [Citation.]" (Emphasis in original.) (657 F.2d 21, 24.)

In the absence of an objection to the court's order, or some similar indication that consultation with counsel was desired, we cannot say that the trial judge's order denied the defendant her right to the assistance of counsel. See *Crutchfield v. Wainwright* (11th Cir. 1986), 803 F.2d 1103; *Mudd v. United States* (D.C. Cir. 1986), 798 F.2d 1509; *Stubbs v. Bordenkircher* (4th Cir. 1982), 689 F.2d 1205; *Bailey v. Redman* (3d Cir. 1981), 657 F.2d 21; *People v. Visnack* (1985), 135 Ill. App. 3d 113; *People v. Seider* (1981), 98 Ill. App. 3d 175.

The defendant also argues that the State introduced irrelevant and prejudicial evidence of other, unrelated instances of abuse supposedly committed by the defendant against the child. Dr. Kirschner, deputy medical examiner of Cook County, attributed the child's death to blunt trauma to the head with salt-water ingestion; in summarizing the autoptic evidence he was permitted to describe, however, various other injuries suffered by the child, including injuries to his legs, buttocks, and hands. The State's purpose in presenting this information was to demonstrate the climate of abuse in which the child lived, to rebut the defendant's argument that the death was accidental; there was no showing, however, that any of those other injuries had been inflicted by either the defendant or her husband, who was also standing trial.

Even if we assume that the evidence of the other in-

juries was improperly admitted, however, we do not believe that the defendant was prejudiced by the error. The State offered the evidence to show the intentional nature of the defendant's acts, yet the trial judge found the defendant guilty not of murder but of involuntary manslaughter, which has a mental state of recklessness. Later, in sentencing the defendant, the trial judge explained, "Now, as far as the State's reference to the other marks on the child's body, I agree that there is no evidence that the other bruises, as I recall a loop mark and such on the back, there is no evidence here that Barbara Brooks caused those marks; ***." Thus, although the trial judge overruled the defendant's objection to the testimony, the record indicates that the trial judge did not make use of the information. Because the defendant was not prejudiced by the admission of the evidence, any error in this regard must be considered harmless. See *People v. Lindgren* (1980), 79 Ill. 2d 129; *People v. Romero* (1977), 66 Ill. 2d 325.

The defendant further argues that she was not proved guilty of involuntary manslaughter beyond a reasonable doubt. This argument was raised in the appellate court and, notwithstanding the decision to grant the defendant a new trial, the court should have considered the question. See *People v. Taylor* (1979), 76 Ill. 2d 289, 309.

The cause of the child's death was a disputed issue at trial. The State's expert, Dr. Kirschner, testified that the child died as a result of blunt trauma to the head with ingestion of salt water; he said that it was not possible to determine whether one of those alone could have been the cause of death. In her confession, the defendant admitted that she had hit the child on the head. The defendant's two expert witnesses, Dr. Peter Hydemann and Dr. Lucille Lester, attributed the child's death solely to the amount of salt in his system, which in his case

produced a life-threatening condition known as hypernatremia dehydration.

The offense of involuntary manslaughter is defined as follows:

> "A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly ***." (Ill. Rev. Stat. 1983, ch. 38, par. 9—3(a).)

The defendant first attacks the sufficiency of the State's evidence that the child suffered multiple blunt trauma to his head. Relying on the defense theory at trial, she then argues that her giving the child the salt-water solution was not an act likely to cause death or great bodily harm and was not done recklessly.

We believe that the record contained sufficient evidence on which the trier of fact—in this case, the trial judge—could have concluded that the defendant recklessly committed acts that were likely to cause death or great bodily harm to the child, and therefore we decline to disturb the trial judge's decision here. (See *People v. Almo* (1985), 108 Ill. 2d 54; *People v. Locascio* (1985), 106 Ill. 2d 529.) Although the defense experts disputed Dr. Kirschner's testimony, the trial judge was not required to accept their explanation for the child's death and to ignore the defendant's admissions that she had hit the child on the head. Moreover, forcing the child to ingest the salt solution was an act likely to cause death or great bodily harm; although death was not the necessary consequence of this punishment, the defendant's own experts testified that it was the result here. In light of the child's poor physical development and condition, giving the child the salt-water solution to drink could have been viewed as a reckless act likely to cause death or great bodily harm. Dr. Kirschner testified that an

amount of salt perhaps as little as three teaspoons could have caused this; Dr. Hydemann, in his testimony, said that one tablespoon of salt—an equivalent amount—would have been sufficient to produce the child's hypernatremic condition.

For the reasons stated, the judgment of the appellate court is reversed and the judgment of the circuit court is affirmed.

Appellate court reversed;
circuit court affirmed.

(Letterhead of)

ILLINOIS SUPREME COURT
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March 30, 1987

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No. 62869 — People State of Illinois, appellant, v. Barbara Brooks, appellee. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 9, 1987.